SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

No. 73-326

In the Supreme Court of the United States

OCTOBER TERM, 1973

ERNEST E. BYRD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the government violated his right to due process on the ground that it failed to honor a plea bargain.

On October 22, 1969, petitioner was arrested following an altercation in a Washington, D.C., bar, the details of which are set forth in the memorandum of the court of appeals (Pet. App. 2a-3a).

On December 15, 1969, in the District of Columbia Court of General Sessions, petitioner entered pleas of guilty to two misdemeanors, simple assault (22 D.C. Code 504) and carrying a dangerous weapon (22 D.C. Code 3204).[1] On March 6, 1970, petitioner appeared for sentencing but withdrew his guilty pleas prior to

[1] The government made no stipulation concerning further prosecutions at this hearing.

pronouncement of sentence. Petitioner was thereafter indicted on seven felony counts.

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on two counts of assault with a deadly weapon and one count of carrying a dangerous weapon, in violation of 22 D.C. Code 502 and 3204. He was sentenced to concurrent prison terms of 18 to 54 months and of one to three years on the assault counts, and one year on the weapons count. The court of appeals affirmed (Pet. App. A).

Petitioner asserts (Pet. 3) that his guilty plea to the original misdemeanor charges was the result of a plea bargain with the United States Attorney's office, and that the pleas were withdrawn because the United States Attorney's office reneged on the bargain by informing him that it would seek felony indictments despite petitioner's plea to the misdemeanors. However, at a subsequent hearing, petitioner's counsel admitted that the reason for withdrawal of the guilty pleas was to avoid commitment of petitioner to Saint Elizabeth's Hospital, which the judge of the Court of General Sessions announced was his intention prior to determination of sentence (Tr. 29-32).[2] The district court inquired of petitioner's counsel: "In other words, you chose not to hold the United States to the bargain," and counsel replied, "Under the threat of our client going to St. Elizabeth's Hospital, we did, that is correct" (Tr. 32).

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[2] "Tr." designates the transcript of the hearing on motions on January 31, 1972.

It is thus clear on this record that it was petitioner who rescinded the plea bargain, thereby relieving the government from any further obligation under it. His withdrawal of his guilty plea renders *Santobello* v. *New York*, 404 U.S. 257, inapposite. The government has no continuing obligation to abide by a plea agreement after the defendant has failed to honor his part of the bargain.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.